



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2004

Ms. Lillian Guillen Graham
Assistant City Attorney
City of Mesquite
PO Box 850137
Mesquite, Texas 75185-0137

OR2004-9278

Dear Ms. Graham:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 211812.

The Mesquite Police Department (the "department") received a request for any and all records related to the requestor's case. You state that you are releasing some of the requested information to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Included among the documents you seek to withhold are arrest warrants and an arrest warrant affidavit. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Thus, you must release the arrest warrants and arrest warrant affidavit to the requestor. *See also* Open Records Decision No. 623 at 3 (1994) (exceptions to public disclosure under chapter 552 of Government Code generally do not apply to information that another statute expressly makes public).

We next note that the submitted information is subject to section 552.022 of the Government Code. This section provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information constitutes a completed investigation made of, for, or by the department. These records are expressly public under section 552.022, and must therefore be released under section 552.022(a)(1) unless the information is expressly made confidential under other law. Section 552.103 of the Government Code is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.— Dallas 1999, no pet.) (government body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Accordingly, the department may not withhold any portion of the submitted information pursuant to section 552.103. However, because information subject to section 552.022(a)(1) may be withheld as provided by section 552.108, we will address your arguments under this exception.

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In support of your contention that the information is excepted from disclosure by section 552.108, you state that "[U]ntil the probation is satisfied, the undersigned contends that the case has not been concluded and is still pending." We find, however, that as the defendant has entered a plea with the court and received a sentence, neither the investigation nor the prosecution of the matter is pending. Accordingly, we conclude that you may not withhold the information under subsection 552.108(a)(1).

You also claim that portions of the submitted information are subject to section 552.101, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other states. Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal and state law. Federal law governs the dissemination

of CHRI obtained from the NCIC network. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"); *see also* Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See id.* at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov't Code § 411.089(b). Thus, CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Likewise, CHRI held by the Texas Department of Public Safety ("DPS") or another criminal justice agency must be withheld from the public as provided by subchapter F of chapter 411 of the Government Code. Therefore, any CHRI obtained from NCIC or TCIC must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

Section 552.101 also encompasses the common law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts an informer's statement only to the extent necessary to protect the informer's identity. *See* Open Records Decision No. 549 at 5 (1990). However, witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege.

You inform us that the reporting party reported a violation of the penal code to the Mesquite police. Having considered your representations and reviewed the submitted information, we agree that the identifying information of the informant, which we have marked, may generally be withheld pursuant to section 552.101 of the Government Code in conjunction with the common law informer's privilege. However, if the requestor, who is the subject of the information, already knows the identity of the informant, this information may not be

withheld from disclosure under the informer's privilege, and must be released. We note that you also claim the informer's privilege for witnesses and other individuals involved in the investigation. You do not explain, nor can we discern, how these individuals are informers. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Accordingly, you may not withhold any of the remaining information you have marked under the informer's privilege.

We also note that the submitted information includes social security numbers. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990. We note that the laws making social security numbers confidential are based on privacy concerns. Therefore, the requestor has a special right of access to his own social security number. *See* Gov't Code § 552.023(b) (information may not be withheld from person who is subject of information solely on basis that information is excepted from disclosure to protect the subject's privacy).

You also claim that some of the submitted information is excepted from disclosure under section 552.130 of the Government Code, which provides, in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, Texas motor vehicle information would normally be excepted from disclosure pursuant to section 552.130. We note, however, that the submitted information contains the requestor's driver's license number. Section 552.130 is designed to protect the privacy interest of the individual to whom the information relates. Therefore, you must release the requestor's driver's license number pursuant to section 552.023. However, you must

withhold under section 552.130 most of the Texas motor vehicle information you have marked, as well as the information we have marked, that does not pertain to the requestor. We note that information relating to a driver's license and motor vehicle title or registration issued by another state or country may not be withheld under section 552.130.

Lastly, we note that some of the submitted information is subject to section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136.¹ We note, however, that section 552.136 is designed to protect privacy interests. Therefore, section 552.136 cannot be used to withhold an account number from the person to whom it belongs. See Gov't Code § 552.023. Here, we are unable to determine if one of the marked credit card account numbers belongs to the requestor. If the marked account number belongs to the requestor, the department must release the number under section 552.023 of the Government Code; if the marked account numbers does not belong to the requestor, the department must withhold the number under section 552.136. We have marked this information accordingly.²

In summary, the department must release the arrest warrants and arrest warrant affidavit under article 15.26 of the Code of Criminal Procedure. Any CHRI obtained from NCIC or TCIC must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code. The department may withhold the information we have marked pursuant to section 552.101 in conjunction with the common law informer's privilege, unless the requestor already knows the identity of the informant. Social security numbers other than the requestor's may be excepted under section 552.101 in conjunction with federal law; the department must withhold the marked information under sections 552.130 and 552.136, unless the marked account number belongs to the requestor. The department must release all remaining information.³

¹ The Office of the Attorney General will raise mandatory exceptions like section 552.136 on behalf of a governmental body but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

² Because we reach this conclusion under section 552.136, we need not address your argument against the disclosure of this information under section 552.101.

³ Some of the information subject to release would generally be withheld from the public under laws and exceptions designed to protect the requestor's privacy. We emphasize that if the department receives a future request for this information from an individual other than the requestor or the requestor's authorized representative, the department should again seek our decision.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).


If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/jh

Ref: ID# 211812

Enc. Submitted documents

c: Mr. Charlie Hawkins
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(w/o enclosures)